

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

1. The petitioner has been a registered day care provider for eighteen years. She typically has seven to eight children in her care aged two through nine years. Until recently, she has had only minor difficulties with the licensing agency. She was cited in 1989 with leaving the children alone briefly while she helped out a neighbor and was allowed to retain her license on her promise that she understood supervision rules and would not break them again. She has had a second, recurring problem: failure to smoke

outside of her home when it is in use as a day care facility and failure to ventilate smoke out of the rooms. She was cited for this problem in 1991 when she agreed to prevent her then husband, whom she blamed for the problem, from smoking in the day care rooms. She was cited again in 1994 when a person was observed smoking in the daycare area during a routine visit. She agreed to prevent this from happening in the future. In response to a complaint about smoking in 1998, the Department visited the home on April 7, 1998 and found that someone was still smoking in the day care area and that there was no ventilation. Again, the petitioner promised to ameliorate the situation. Her registration was not threatened on any of those occasions.

2. In March of 2000, the Department received a complaint that two children had been mistreated while in the petitioner's care and that safety hazards existed in the home. A licensing specialist made an unannounced visit to the petitioner's home on March 6, 2000. She again noted that the air was stale with cigarette smoke. She discussed the matter with the petitioner who said that it had occurred before the children had come into the home and that she had smoked outside after they had arrived. The windows were closed due to winter weather and no ventilation system was noted to carry

the cigarette residue outside. The specialist discussed the supervision and mistreatment allegations with the petitioner during this visit and left a "field form" signed by the petitioner regarding the violations that she saw including the smokey room. The petitioner was also required to post a "Notice of Violation" for parents of children in care to read and initial.

3. After this information was reviewed by the chief of licensing, the Department mailed a notice to the petitioner on May 3, 2000 informing her that her day care registration would be revoked because the facts found indicated that serious violations existed of various regulations involving care, supervision, discipline and the health and safety of children, as well as administrative requirements to keep the Department informed of persons in the day care. The petitioner was advised that due to the present risk of harm to the children and the repeated nature of some of the violations that her registration would be revoked instead of allowing her to correct the violations and that she had a right to a further hearing.

4. The petitioner pursued a further internal hearing with a representative of the Commissioner. The Commissioner reviewed all of the licensing history, all information offered

by the petitioner, including her statements and those of other parents and concluded that: (1) the petitioner had continued to subject children in her care to cigarette smoke in spite of several warnings; (2) she had left children in her care unsupervised on one occasion in 1989 and, after a warning regarding that incident, had failed to properly supervise two children in her care in 1999 when they were allowed to wander from the day-care home repeatedly for long periods of time; (3) she had left hazardous cigarette lighters in a drawer easily accessible to children, two of which had been discovered by a child who set himself on fire twice within a few minutes; (4) she had slapped a child and left a mark on his face after he caught on fire; and (5) she had failed to notify the Department that an adult male had moved into her home so a background criminal check could be run on him. The Department concluded that these facts constituted a violation of several program regulations prohibiting corporal punishment, requiring supervision of children, safeguarding children from hazards and reporting persons in the household so criminal checks can be run. The petitioner was notified by letter dated August 31, 2000 as to the specific regulations violated and was advised that in spite of supportive statements written by other parents of children in her care,

the Commissioner believed that the facts indicated that she was "unable to comply with Family Day Care Regulations" and that the petitioner's conduct "has left children at considerable risk." The decision remained to revoke the license. The petitioner was advised that she could seek a hearing before the Human Services Board.

5. The petitioner requested a hearing that was held on September 12, 2000. Under oath, the petitioner admitted the following facts:

- a. She had cared for two young brothers aged seven and eight for about a year beginning in 1998. She had difficulties with these two boys that she did not have with other children. For example, they liked to get on their bikes and ride away from the day care home which is located on a busy street. Sometimes they were gone for fifteen minutes, likely visiting their own home nearby which brief visits, she believed, were approved by their mother; other times they disappeared for hours at a time. This same kind of event occurred some ten to twenty times while she cared for them. When they were gone for more than fifteen or twenty minutes, she got a relative who lives upstairs to cover for her at the

day care and went looking for the boys. It did not occur to her to contact the boys' mother at work when they did this or to seek assistance from the police. She did not feel that there was anything she could do to prevent the boys from leaving her home.

- b. The petitioner had particular difficulty with one of the boys who liked to play with lighters. On one occasion in May of 1999, the boy went to a drawer in her kitchen that he had been told not to open and took out a cigarette lighter and lit the sleeve of his shirt. The petitioner saw the slowly burning flame and told the boy to put out the fire on his shirt. He did so and she took the lighter away from him and put it into her own pocket. A few minutes later, she found that the boy had taken another lighter (she was not sure where it came from) and again had set his sleeve on fire which began to burn more rapidly than last time. He began brushing his hair with this sleeve which alarmed the petitioner. She instructed him to put the fire out. When he said no, the petitioner "panicked" and slapped the boy across the face, leaving a black and blue mark.

He then put out the fire on his sleeve. She did not inform the boy's mother immediately of this occurrence because the boy asked her not to. The mother was angry when she saw the slap mark on her son's face but did not learn until almost a week later that he had set himself on fire.

- c. The petitioner did have a young man living in her home for some ten months though he was rarely there. She did know that he had a reputation for being short-tempered but never saw angry behavior herself. It did not occur to her that she needed to let SRS know about his presence in the day care home.
- d. In 1989, the petitioner went to a neighbor's apartment for a few minutes while the children in her care were napping to help an elderly cancer patient sit up in bed. She could see her apartment from the neighbor's apartment and her husband was in the apartment getting ready for work. She received a surprise visit from an SRS investigator and was told at that time that she should not leave the day care premises even for a few minutes unless a registered day care worker was in her home. The

petitioner agreed that she would not leave any children unsupervised again.

6. The petitioner does not agree that she has continued to allow smoking while the children are in care. She agrees that the Department has notified her of this problem on three occasions in the past and that on those occasions persons were smoking in the day care. Although she herself is a smoker she has blamed the activity on her ex-husband (who is no longer in the home) and other visitors. She says that she always goes outside to smoke when the children are in care and if there is any smoke in the day care it is the lingering smell from smoking before day care hours. She has been unable to devise a system to ventilate the rooms, particularly in the winter when the windows are shut. (The investigatory visit took place in March 2000 when the windows were shut.) The SRS investigator testified that the smell of cigarette smoke was strong when she entered the daycare in March of 2000. Several parents (both smokers and non-smokers) of children at the daycare testified that they had not noticed the smell of cigarettes when leaving off or picking up their children. No finding can be made based on this testimony that anyone was actually smoking in the daycare during the hours of operation in March of 2000. It does appear from the evidence that at

least on the day of the visit in March, cigarette smoke was in the air and the building and was not properly ventilated.

7. The petitioner agrees that she was provided with a copy of the day care regulations but protests that she did not really understand how to carry them out, such as ventilating a room or calling the parent or the police when the boys ran away. She was unable to stop her ex-husband from smoking in the presence of the children but he has now left. She understands that it was wrong to slap the boy who was on fire but said she was in a panic and did not want him to get hurt. No other child has been hurt in her house in fifteen years and she does not otherwise use corporal punishment to discipline children. The young man who was living in her home never caused a problem. She has been unable to get the Department to revisit her home to see if she has corrected the violations cited.

8. Four parents whose children are currently in the petitioner's care testified that their children are well-supervised and well-treated in the petitioner's home and that it would be difficult for their children to change caretakers at this point because of their attachment to the petitioner. They are unaware of the petitioner ever using physical discipline on their children and believe she employs a "time-

out" method to care for their children. Their testimony, though somewhat self-serving in a tight daycare market, is found to be credible. A former parent also testified on the petitioner's behalf that she was a good day care provider who supported the parents and was well-liked by the children.

9. The Commissioner made the decision to revoke for the violations rather than to allow for corrections because he felt the violations with regard to supervision, physical discipline and protection from hazards were egregious. He felt the violations demonstrated that the petitioner could not exercise good judgment or understand her serious obligation to supervise children at all times and the steps she should have taken when the children did not return to her home. The Commissioner did not feel that the 1989 lack of supervision nor the smoking and non-ventilation violations were sufficient at the earlier time to warrant revocation and she was allowed to correct them. However, their repeated nature has, in his view, made them another basis for revocation of the day care registration. The failure to report the young man living in the home was particularly worrisome for the Department since he was well-known to them as he had been in SRS custody and they felt he might be dangerous. The Commissioner concluded that the petitioner showed a serious lack of judgment in

dealing with these two boys and with her obligation to keep all of the children safe by protecting them from hazardous air, by keeping hazardous materials out of reach and by not exposing them to dangerous persons. The Commissioner felt that the petitioner should have known what was expected of her because she had received a copy of the regulations, had an orientation meeting, was required to do six hours of training per year and had been specifically notified during past visits regarding her duties to supervise and protect children from hazards. Because of the seriousness of the violations and the repeated nature of at least one of the violations, the Commissioner rejected a program of compliance as an appropriate remedy.

ORDER

The decision of the Department revoking the petitioner's family day care registration is affirmed.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services has the authority to adopt rules and regulations governing the day care registration program, including standards to be met and conditions for revocation of

the Day Care Home Certificate. 33 V.S.A § 306(b)(1). Those rules and regulations are required by statute to be "designed to insure that children in . . . family day care homes are provided with wholesome growth and education experiences, and are not subjected to neglect, mistreatment or immoral surroundings." 33 V.S.A. § 33 V.S.A. § 3502(d). Such rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes", effective October 7, 1996. Furthermore, the Commissioner has the specific authority to revoke registrations "for cause after hearing." 33 V.S.A. § 306(b)(3).

Among the regulations adopted by the Commissioner are the following:

DEFINITIONS

CHILD CARE - The developmentally appropriate care, protection and supervision which is designed to ensure wholesome growth and education experiences for children outside of their homes for periods of less than 24 hours a day in a day care facility.

CORPORAL PUNISHMENT - The intentional infliction of pain by any means for the purpose of punishment, correction, discipline, instruction or other similar reason.

SERIOUS VIOLATION - A violation of group size, staffing requirements or any violation which immediately imperils the health, safety or well-being of children. Serious violations may also include corporal punishment, lack of supervision, physical or sexual abuse or health and safety requirements.

SUPERVISION OF CHILDREN - The knowledge of and accounting for the activity and whereabouts of each child in care and the proximity of staff to children at all times assuring immediate intervention of staff to safeguard a child from harm and maintenance of the program of the facility.

SECTION I - ADMINISTRATION

1. The Registrant, and all other caregivers, shall be at least eighteen (18) years of age, able to read, and physically, mentally, and emotionally capable of performing activities normally related to the provision of child care.

. . .

3. A person shall be prohibited from the Registered Family Day Care Home when her/his presence or behavior disrupts the program, distracts the staff from their responsibilities, intimidates or promotes fear among the children, or when there is reason to believe that their action or behavior will present children in care with risk of harm.

4. The following persons may not operate, reside at, be employed at or be present at a Family Day Care Home:

- a. persons convicted of fraud, felony or an offense involving violence or unlawful sexual activity or other bodily injury to another person including, but not limited to abuse, neglect or sexual activity with a child; or
- b. persons found by a court to have abused, neglected or mistreated a child;
- c. adults or children who have had a report of abuse or neglect substantiated against them under Chapters 49 and 69 of Title 33 Vermont Statutes Annotated.

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SECTION II - PROGRAM

2. There shall be at least one caregiver present and providing child care at all times when children are in care.

During outside play:

- a. Infants and toddlers shall be supervised by a caregiver present,
- b. preschoolers and school age children may be monitored from inside the home if their area or play is within sight and earshot of a caregiver.

SECTION III -GUIDANCE/DISCIPLINE

1. The caregiver shall use positive methods of guidance/discipline which encourage self-control, self-direction, self-esteem and cooperation. Guidance/discipline shall be designed to meet the individual needs of each child including the Registrant's and caregiver's own during the hours children are in care.
2. The caregiver shall treat each child with respect and encourage children to treat each other respectfully. Children shall be given opportunities to learn, socialize and cooperate as individuals, as well as group members. The caregiver shall promote self-esteem and cooperation through positive reinforcement and role-modeling.

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4. Guidance/discipline shall not include any form of cruel and unusual punishment, including corporal punishment, such as, but not limited to:

- a. Hitting, shaking, biting, spanking, pinching.

. . .

5. This section does not prohibit a person from using reasonable and necessary force to obtain possession of dangerous objects in the control of the child, for self defense, or for the protection of persons or property.

SECTION IV - RELATIONSHIPS BETWEEN PARENT AND REGISTRANT

1. Parents/guardians shall have access to information about their child's daily activities and behavior.

SECTION V - HEALTH AND SAFETY

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8. Smoking tobacco is prohibited in the presence of children who are in care.

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10. Children in care shall be protected from any and all conditions which threaten a child's health, safety and well-being. This includes protecting children from stoves, pools, poisons, window covering pull cords, asbestos, wells, known vicious animals, medications, dust or chips from lead paint, traffic and other hazards.

. . .

20. Areas used by children shall be well lighted, well ventilated, clean, free from hazardous substances and sufficient in size to permit children to move about freely.

SECTION VI - RELATIONSHIP BETWEEN REGISTRANT AND DIVISION OF LICENSING AND REGULATION

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9. A violation of any section of the law or regulations regarding a Family Day Care Home may be cause for the revocation of the Registration Certificate.

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11. When violations are found to exist, the Department may offer a registrant the opportunity to develop a program improvement plan whereby the violations will be corrected within a time period specified by the Division. Such opportunity may not be provided when the violation poses risk of harm or is of repeated nature.

Regulations for Family Day Care
Homes, Effective October 7, 1996

If the petitioner has violated any of the above regulations, the Commissioner has the authority to determine what action to take and the "cause" needed to revoke a day care registration certificate if he deems it an appropriate remedy. 3 V.S.A. § 8814, Huntington v. SRS, 139 Vt. 416 (1981) Fair Hearing No. 10,414. The Board may only overturn such a decision if the Commissioner has acted arbitrarily, capriciously or has otherwise abused his discretion. See Fair Hearing Nos. 12,804, 15,027 and 15,430.

The facts clearly show the violation of two important regulations, namely Section V (10) requiring the protection of children from hazards and Sections I(1) and II(2) and the Definitions section requiring care and supervision of children. By her own admission, the petitioner left cigarette lighters in places where they were easily accessed by children. One of those children accessed two of the lighters and set himself on fire twice within a few minutes. She also

admitted that she allowed that child and his brother out of her sight repeatedly for long periods of time when they left her home which is located on a busy street. The petitioner had clearly been warned in 1989 of her duty to closely supervise children. The petitioner showed poor judgment in her provision of child care on those occasions. The petitioner has also violated the regulation at Section V(20) requiring that the day care area be well-ventilated and free from hazardous substances when she allowed cigarette smoke to remain in the room despite several warnings over a number of years that this was hazardous to children. And finally, she has violated the regulation at Section IV(1) by failing to inform the boys' mother immediately of their repeated absences from the day care home and that one of the boys had set himself on fire.

Although the Department is correct that the petitioner had an adult living in her home of whose presence it was unaware, no regulation exists requiring the petitioner to report persons who move into her home. Although the regulation at Section I(4) requiring criminal checks on persons living in the household certainly implies that the Department needs to be aware of who is in the household, regulations do not direct the petitioner to make such a

report. Neither can it be found on the evidence offered that the adult in her home posed a risk to children in her care in violation of Section I(3). In addition, it cannot be found that the petitioner violated the regulation on corporal punishment. The regulation at Section III(4) prohibits corporal punishment as a form of guidance or discipline. The petitioner was clearly not disciplining the child when she slapped him but was rather trying to prevent him from starting his hair on fire. The regulation at Section III(5) allows the use of reasonable and necessary force to protect the child from harm. Although in retrospect there might have been a better way to handle this situation, it was clearly an emergency and the child suffered no lasting harm from either the fire or the slap. The evidence shows that the petitioner does use non-physical forms of punishment to discipline children. No violation of the corporal punishment regulation can be found from these facts.

The remaining question is whether the Department acted arbitrarily in determining that the petitioner's day care registration should be revoked. The Commissioner has the authority to revoke any day care registration "for cause" under the statutory scheme. Under the regulations, the violation of any regulation may be "cause" for revocation.

Section VI(9). The regulations further single out lack of supervision and exposure to hazardous situations as "serious violations". (Definitions) The Department has the discretion to offer a registrant the opportunity to correct any violation but also has the authority to withdraw such an opportunity when the violation "poses risk of harm or is of a repeated nature." Section VI(11).

The Commissioner has determined in this case to revoke the day care license because of the seriousness and repeated nature of the violations. Although the evidence does not support a finding that the petitioner violated all of the regulations claimed by the Department, she clearly violated two of the most serious ones regarding supervising children and protecting them from safety and health hazards. The violation of these regulations does pose a risk of harm for children and were repeated in nature. It cannot be said, therefore, that the Commissioner's decision to revoke the day care license in this case was unreasonable. Even if the Board would have reached a different conclusion on revocation, it cannot substitute its decision for that of the Commissioner if it is a reasonable one. The decision of the Commissioner

revoking the petitioner's day care registration must be upheld. 3 V.S.A. § 3091(d) and Human Services Board Rule 17.

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